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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended working group
on a draft optional protocol to the
Convention on the Rights of the Child
on the sale of children, child
prostitution and child pornography as
well as the basic measures needed for
their prevention and eradication
First session
14-25 November 1994

COMMENTS ON GUIDELINES FOR A POSSIBLE DRAFT OPTIONAL PROTOCOL

Report of the Secretary-General

Addendum

The present document contains comments submitted by the Governments of Morocco and Sweden and by the Committee on the Rights of the Child and the International Labour Organisation.

GE.94-14492 (E)

Morocco

[Original: Arabic]
[23 September 1994]

1. The Government of Morocco stated that it wished not merely to commend the Commission on Human Rights for focusing on the serious phenomena of sale of children, child prostitution and child pornography, which have become widespread in many parts of the world, but also proposed measures that it deemed appropriate for the eradication of these practices and the protection of children therefrom. It also considered the manner in which these measures could be made international. The three points on which Morocco's comments focused were:

(a) The need to adopt uniform international measures concerning the phenomenon of the sale and sexual exploitation of children;

(b) The need for these measures to seek to eliminate those practices and protect children therefrom;

(c) The need to vest these measures with the same force as the Convention on the Rights of the Child.

I. THE NEED TO ADOPT UNIFORM INTERNATIONAL MEASURES CONCERNING THE PHENOMENON OF THE SALE AND SEXUAL EXPLOITATION OF CHILDREN

2. This need is based on two substantiating factors: the increasingly widespread worldwide phenomenon of the exploitation of children, and the inadequacy of the international conventions in force to eliminate these practices and protect children therefrom.

3. Morocco considered the concept of the exploitation of children in its broad sense, i.e. including the abduction, sale or traffic in children and all forms of exploitation and sexual abuse, as well as the exploitation of child labour and the use of children as soldiers in armed conflicts and in the promotion and consumption of narcotic drugs. These are the most important manifestations of the tragic situation of children throughout the world.

4. Although the national reports submitted to the Committee on the Rights of the Child pursuant to articles 43 and 44 of the Convention on the Rights of the Child do not explicitly reveal the magnitude of this phenomenon, an estimate of the extent of the measures taken by each State to implement that Convention implicitly indicates that this phenomenon is sufficiently widespread to necessitate the large number of provisions and plans of action referred to in those reports.

5. However, the special reports recently published by specialized United Nations bodies unquestionably indicate the widespread nature of this phenomenon and even emphasized that it is a tragedy affecting children throughout the world. Those reports are unanimous in stating that this has become a worldwide phenomenon. They note that it has spread to most parts of the world, particularly Asia, Europe and the Americas, although it is rare in Africa. The distribution of participation in the phenomenon of the sale of,

and traffic in, children is largely governed by the economic situation in so far as the poorer regions (Asia, Eastern Europe and South America) are "exporting" or "supplying" regions whereas the wealthier regions (Western Europe and North America) constitute "receiving" regions in which there is a "demand". It has even been noted that wealthy and depraved persons from these regions travel to the poorer regions in quest of sexual gratification, not to mention the pornographic films and other material based on the exploitation of children.

6. According to the same reports, the laws and measures adopted by States remain limited in their effectiveness and contain only general provisions concerning the prohibition of acts that endanger the life, health, physical well-being and morals of human beings. It would have been more appropriate to make children subject to special provisions, separate from general legislation, in order to regulate the legal status of children and ensure their protection and welfare in a stricter manner. Moreover, that legislation is rarely respected or applied and is frequently circumvented.

7. These practices are unquestionably subject to the provisions of the general conventions concerning the abolition of slavery, the slave trade and similar institutions and practices, as well as the conventions prohibiting the traffic in persons and exploitation of the prostitution of others, since the definitions of these acts cover practices relating to the sale of children, child prostitution and child pornography.

8. However, it is noteworthy that these definitions are still only of a general nature and require a form of adaptation to the specific nature of the phenomenon, precisely in the same way as the special nature of the child necessitated the specification of its rights in a separate convention. The wording of the general definitions cannot cover all the various forms in which the sale, exploitation and sexual abuse of children are practised and, to say the least, those definitions can be circumvented. The most significant of those forms are the commercial adoption operations that have become the most prevalent form of adoption: the sale of children by their families either to a middleman or to an adoptive parent; the abduction or purchase of children with a view to their resale for adoption or as slaves; and the adoption or purchase of children for purposes of sexual exploitation either by exposing them to physical abuse or by exploiting them for the production of pornographic material. In fact, some middlemen organize tourist trips for that purpose and children are frequently adopted, purchased or abducted with a view to exploiting their labour in arduous work. The exploitation of child labour undoubtedly constitutes a form of the sale of children and Morocco does not believe that the Special Rapporteur assigned by the Commission on Human Rights to update the study previously prepared by Abdelwahab Bouhdiba on this subject in 1981 will deviate from the approach adopted by the Special Rapporteur on the sale of children.

9. In addition to general rights that are not confined solely to children but apply to people in general, the Convention on the Rights of the Child incorporates rights that apply solely to children. In fact, it can be said that these special rights constitute the new element that the Convention introduces; they are its prime motive without which it would lose its raison d'être. The most important of the special rights is the child's right

to protection from exploitation and all forms of physical or mental violence, injury or abuse. In some articles of the Convention, this right is worded in general terms covering all forms of exploitation and abuse (arts. 19 and 36). However, some forms of exploitation are covered by special provisions contained in the following articles: 11: concerning measures to combat the illicit transfer and non-return of children abroad; 32: concerning the protection of children from economic exploitation; 33: concerning the protection of children from exploitation in the production, promotion and consumption of narcotic drugs; 34: concerning the protection of children from all forms of sexual exploitation and sexual abuse; 35: concerning prevention of the abduction of, the sale of or traffic in children; 38: concerning the protection of children under 15 years of age from exploitation in wars or armed conflicts; 39: concerning the physical and psychological recovery and social reintegration of child victims of any form of exploitation.

10. These articles elicit several comments concerning their form or content. In general, a comparative study of the content of the Convention on the Rights of the Child and the content of other previous conventions might lead to the conclusion that there is nothing new in this Convention except the general terms in which particular rights are formulated and incorporated alongside other rights of the child. In this connection, Morocco referred in particular to the exploitation of child labour and the military conscription of children below the legal age.

11. Even on the assumption that the Convention recognizes the right of the child to protection from all forms of exploitation, it does not make such protection subject to a single provision. In some cases it speaks of measures to combat specific forms, while in others it speaks of measures to protect or safeguard children from other forms of exploitation and in some cases it speaks of preventive measures.

12. Furthermore, the Convention merely recognizes rights without specifying ways to uphold them and ensure that they are respected. Although the Convention prohibits the sale of children as well as the inducement or coercion of children to engage in any illicit sexual activity or their exploitation therein, it merely declares this right and leaves full scope for national laws and bilateral or multilateral agreements to devise means of prevention or protection.

13. Although the laws of the States parties are unanimous in prohibiting such forms of exploitation in the same way as the sale and abduction of children, it has been established that these laws are not adequately respected and, in addition, differ from each other in some respects. It has also been established that the phenomenon had become worldwide and requires uniform international provisions, which the Convention on the Rights of the Child does not contain. This shortcoming should be remedied by proposing new measures.

II. THE NEED FOR THESE MEASURES TO SEEK TO ELIMINATE THOSE PRACTICES AND PROTECT CHILDREN THEREFROM

14. In this connection, it should be noted that this proposal is not made in a vacuum; it is being made after a study by Morocco of a number of international programmes and proposals submitted to the Commission on

Human Rights on this subject. The common characteristic of all these programmes and proposals lies in the emphasis that they place on the preventive aspect. This is a fundamental requirement that constitutes one of the aims of the new measures that are being proposed here. A distinguishing feature of the proposed draft optional protocol lies in the concept of international criminalization, for which Morocco would have liked to see explicit provision made in the Convention on the Rights of the Child in view of the gravity of this phenomenon at the international level. The programmes of action, on the other hand, leave the question of criminalization to the discretion of the national laws while urging States to improve the legal measures and apply them in a more effective manner.

15. Accordingly, the aims of these international measures could be summarized in two concepts: prevention and international criminalization. In that connection, the following aspects must be emphasized.

16. The stimulation of awareness concerning the gravity and dangers of the phenomenon and the need for the campaign to cover all persons entrusted with the care or custody of children, such as persons responsible for their upbringing and education and associations concerned with the rights of the child, in such a way as to publicize the rights of the child, expose and combat the phenomenon and promote the recovery and rehabilitation of the child victims.

17. Endeavours should focus on the causes of this phenomenon and ways to eliminate it. Although poverty has been identified as the principal cause in many States, it is not the only cause, as has already been pointed out in the report of the Special Rapporteur on this question since, even if it explains the phenomenon in the "supplying" or "exporting" States, it does not explain it in the "receiving" States in which there is a "demand" where there appear to be other causes linked to perversion, corruption and the widespread trade in human organs. In general, poverty remains one of the main factors that must be combated within the context of general social development strategies. There is also a need to assist the poorer States which constitute fertile ground for sexual exploitation and a source of children for sale abroad for purposes of adoption or as sources of human "spare parts".

18. Endeavours to establish a system to restrict transnational adoption as far as possible undoubtedly constitute one of the principal means of protection since many trafficking operations take place for the alleged purpose of "adoption". The restriction of transnational adoption should not be confined to the reform and strengthening of its procedures; attention should be focused on the concept of adoption itself with a view to the abolition of its personal aspect consisting in the fact that the adoptive parent deprives the adopted child of its name and lineage. It has been found that this aspect allows adoption to be transformed into a means of slavery. This was emphasized in the recommendations made at the World Conference of the International Law Federation held at Warsaw in August 1988, which emphasized "the need to avoid severing the child's link of kinship with its original family and to ensure that adoption was understood in its substantive rather than its personal aspect", as is the case in the system of custody, through foster families for example, under Islamic law and other similar systems.

19. Attention should also be paid to the system of organ transplantation with a view to the promulgation of legal rules designed not merely to authorize this type of therapeutic surgery, since such authorization has already become a fait accompli due to the advances made in the field of medicine and biology, but rather to devise a legal framework to provide greater protection for the donor and, consequently, to designate trafficking in human organs as a punishable offence.

20. The various national laws, even those that permit prostitution, undoubtedly prohibit the sale and sexual exploitation of children. However, the report of the Special Rapporteur, as well as other reports, indicate that these laws are ineffective. The conventions on the suppression of slavery and the prohibition of the traffic in persons and exploitation of the prostitution of others unquestionably prohibit such acts, regardless of whether they are committed against women or children. However, in actual practice, those conventions are circumvented by various forms of exploitation of children.

21. Accordingly, there is a need for a special provision to regulate this particular question by explicitly designating such acts as internationally prohibited offences and obliging States to prosecute their perpetrators and refer them to international or national courts for punishment in the manner to be agreed upon in the optional protocol, since these acts constitute crimes against humanity.

22. As a subsidiary aim, efforts must be made:

(a) To regulate these forms of exploitation by defining such acts/offences. To this end, use could be made of the definitions formulated by the Special Rapporteur in regard to the sale of children, the exploitation of their labour or other forms of the sale of children, child prostitution and the exploitation of children for pornographic purposes;

(b) To punish the perpetrators, abettors, accomplices and beneficiaries and also to prescribe penalties for the attempted commission for such offences;

(c) To ensure closer international cooperation in regard to the detection and, in particular, the investigation of such offences, since the exploitation of children has become a worldwide phenomenon. International cooperation could assume a number of forms, particularly an exchange of evidence and collaboration with a view to the arrest, trial and extradition of criminals and the indemnification, recovery and social rehabilitation of victims.

III. THE NEED TO VEST THESE MEASURES WITH THE SAME FORCE AS THE CONVENTION ON THE RIGHTS OF THE CHILD

23. This can be done only by incorporating these measures in the said Convention and regarding them as an integral part thereof since, in actual fact, they constitute new measures to supplement the Convention and remedy its shortcomings. In addition, they grant children an effective right to protection from any exploitation. Such incorporation would entail an undertaking by the States parties to make these measure widely known, by

appropriate and active means, to adults and children alike, as in the case of article 42 of the Convention. The States parties would also undertake to specify, in their national reports submitted to the Committee on the Rights of the Child in accordance with articles 43 and 44 of the Convention, the practical steps that they have taken to implement these new measures incorporated in the Convention in connection with the sale and sexual exploitation of children.

24. It might be wondered whether these measures could be enforced more effectively by amending the Convention on the Rights of the Child or by incorporating them in an optional protocol. Morocco believes that the rule laid down in article 50 of the Convention, concerning its amendment, might prevent the rapid adoption and entry into force of these measures. It might also prejudice a Convention that has achieved considerable support and success.

25. Accordingly, it would be preferable to resort to the internationally recognized practice in regard to the conclusion of treaties, namely the appending of "protocols". This designation does not imply that they should not be regarded as international conventions in the sense recognized in international law. Consequently, they are covered by the definition laid down in article 2 (a) of the Vienna Convention of 1969. However, in international practice, their purpose is to amend or supplement a preceding convention by adding new provisions, providing further details or expanding the scope of its application to other measures that could not be incorporated in the convention at the time of its conclusion either because of differences of opinion among States or because there was no need for its incorporation in the convention at that time.

26. With regard to the optional nature of the protocol, this means that its signature, its ratification or accession thereto are not linked to the commitment to the Convention itself although, logically, it should be open for signature by all the States that have signed, ratified or acceded to the Convention. The States parties to the Convention have a right to become parties to the protocol in the same way as States which are not parties to the Convention are entitled to become parties to the protocol. States parties to the Convention may also withdraw from the protocol without affecting their commitment to the Convention to which it is appended.

27. Furthermore, the entry into force of the protocol should not be conditional on satisfaction of the same number of requirements for the entry into force of the Convention. Instead of stipulating the need for 20 ratifications or accessions, a smaller number, such as half or one third, should suffice in order to facilitate the rapid adoption and entry into force of the convention (i.e. the protocol).

28. In short, if the best interests of the child (art. 3 of the Convention) are among the aims, it should be noted that this matter concerns children in dire need of care, particularly in view of the fact that they are children in a difficult situation requiring ongoing care and increased protection. Morocco believes that the measures that it has proposed would achieve that purpose if they are vested with the same force as the Convention on the Rights of the Child and prove to be as successful as that Convention.

Sweden

[Original: English]
[21 September 1994]

29. The sexual exploitation of children is an abhorrent practice which violates the inherent dignity of the child. The Convention on the Rights of the Child contains clear obligations for States parties to prevent such exploitation and to take all appropriate measures against the abduction, sale of or traffic in children. The Convention also includes a general obligation to protect the child against all other forms of exploitation. The Committee on the Rights of the Child performs a crucial role in monitoring compliance with these obligations.

30. The work done by the Special Rapporteur on the sale of children to find ways of improving the situation of children in difficult circumstances is also of great importance. A further initiative in this field is the Programme of Action for the prevention of the sale of children, child prostitution and child pornography, adopted by the Commission on Human Rights resolution 1992/74, which requested States to inform the Sub-Commission on Prevention of Discrimination and Protection of Minorities on measures taken to implement the programme.

31. In the view of the Swedish Government, there are thus both normative provisions concerning the sale of children and related forms of exploitation, and mechanisms supervising the implementation of these provisions. At this stage, priority should therefore be given to achieving universal adherence to the Convention on the Rights of the Child, unrestricted by inadmissible reservations. Greater adherence must be accompanied by universal compliance with the provisions of the Convention. If children continue to suffer from exploitation, it is not that there are not norms to protect them, but that these norms are not being sufficiently implemented, nationally and internationally.

32. While agreeing fully with the aim of eradicating every form of exploitation of children, in accordance with the Convention on the Rights of the Child, the Swedish Government is thus not convinced that this purpose is best served by the elaboration of an optional protocol to the Convention at this stage. It is of utmost importance that the views of the Committee on the Rights of the Child and the Special Rapporteur on the sale of children, child prostitution and child pornography on the proposed guidelines for an optional protocol, be given full consideration in the work of the working group.

Committee on the Rights of the Child

[Original: English]
[5 October 1994]

33. The Committee welcomes the opportunity of closely cooperating with the working group and it hopes that the holistic approach of the Convention on the Rights of the Child to the fundamental rights of children, as well as the

activities developed by the Committee in the field of the sale of children, child prostitution and child pornography, may be considered as a source of inspiration to the working group.

34. The Committee examined resolution 1994/90 of the Commission during its sixth session, held in April 1994. Following such consideration, the Committee decided to adopt a recommendation, included in the report of the session (see recommendation 3 in document CRC/C/29).*

35. As stated in the recommendation, the Committee recalls the importance it has always paid to the dramatic situation of the sale and trafficking of children, child prostitution and child pornography, both in the framework of the consideration of the States parties' reports already submitted to it, and in the course of the general discussion it organized on the "economic exploitation of children". For that reason, it submits to the working group of the Commission on Human Rights the relevant chapters of its reports, reflecting the general thematic discussion, as well as the recommendations adopted thereafter.*

36. The Committee would further like to stress the unprecedented support given by the international community to the Convention on the Rights of the Child, the most widely ratified instrument adopted in the field of human rights. As recognized by the Commission in resolution 1994/90, the Convention is for this reason particularly well placed to play a decisive role in ensuring effective protection of the rights of the child. As also stated there, its essential values and effective implementation system are fundamental means to prevent and combat situations of sale of children, child prostitution and child pornography.

37. In fact, the Convention has defined the legal framework in this field. It was later meaningfully complemented by the two programmes of action adopted by the Commission on Human Rights, for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and for the Elimination of the Exploitation of Child Labour.

38. Thus, States parties to the Convention (166 in September 1994) have undertaken an international commitment to adopt all appropriate measures to ensure and respect the rights recognized by the Convention. Moreover, the World Conference on Human Rights, while stressing that exploitation and abuse of children should be actively combated, called on States to integrate the Convention on the Rights of the Child into their national action plans.

39. In view of this reality, it is the firm belief of the Committee that the priority should now lie with the strengthening of the implementation of such existing international standards.

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* Photocopies available with the secretariat.

International Labour Organisation

[Original: French]
[13 September 1994]

40. Since the foundation of the International Labour Organisation, the protection of children and young persons has been one of its primary concerns. The eighty-first session of the International Labour Conference (Geneva, June 1994) considered the situation in certain countries that had been the subject of observations of the Committee of Experts on the Application of Conventions and Recommendations concerning the application of the Forced Labour Convention, 1930 (No. 29).

41. Guidelines on the sale of children and on the use of children in prostitution and pornography must take account of the existing international instruments on that subject, including the Slavery Convention, 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the Forced Labour Convention, 1930 (No. 29) and the Minimum Age Convention, 1973 (No. 138).

42. The ratification and implementation of these instruments, which provide a solid basis for national and international action to combat the sale of children and the use of children in prostitution, must be encouraged. Consideration should also be given to the recommendations made by the Special Rapporteur on the Traffic in Persons and the Exploitation of the Prostitution of Others (E/1983/7).

43. The International Labour Organisation does not see prostitution as "work" or a "service". However, in the case of children or adolescents who because of their age are unable to give their valid consent, prostitution is taken by ILO supervisory bodies to be forced labour within the meaning of the Forced Labour Convention, 1930 (No. 29) which refers to "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". The penalty in question does not refer only to penal sanctions but may also include the deprivation of a right or benefit. The States that have ratified the Convention must adopt and enforce effective sanctions on persons exacting forced or compulsory labour. This instrument has been ratified by 135 States.

44. With regard to combating pornography, article 3 of the Minimum Age Convention, 1973 (No. 138) provides that "the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the [...] morals of young persons shall not be less than 18 years". This provision prohibits, inter alia, the use of children or young persons in pornography. Furthermore, the participation of children under the age of 15 years in activities such as performances or photographic sessions, under article 8 of the aforementioned Convention, requires individual authorization from the competent authority which must lay down the conditions of participation. The Convention also

provides that all necessary measures "including the provision of appropriate penalties" shall be taken by the competent authorities to ensure the effective enforcement of its provisions.

45. While seeking to avoid duplication or a weakening of the protection already afforded, the proposed guidelines should complement the instruments in force in several areas: the definition of pornography, the suppression of sex tourism, sanctions, the strengthening of regional and international cooperation to combat the sale of children, child prostitution and the use of children in pornography.

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